IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 107 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT HOUSING BOARD

Versus

VIPUL CORPORATION

Appearance:

1. Civil Revision Application No. 107 of 1998

MR SB PANDIT for Petitioner No. 1

MR KG SHETH for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 21/06/2004

ORAL JUDGEMENT

This revision application is filed as per Sec. 12 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 against an order passed by

the Gujarat Public Works Contracts Disputes Arbitration Tribunal on 17.10.1997. The Tribunal is constituted by the above said statute and revision against the award of Arbitration Tribunal as per sec. 12 of the said Arbitration Tribunal Act, 1992 is provided to the High court.

2. As per the brief facts of the case, the present petitioner - Housing Board awarded a contract to present respondent- Vipul Corporation for Water Proofing work of 360 Middle Income Group Houses at Valsad on 22.11.1994, being highest bidder, on accepting the tender. The work order of the said contract was issued to the contractor on 25.11.1994. As per the record, line out of the work was given to the contractor on 13.12.1994 at the site. It appears that at the last moment, when work was about to be started, the work was obstructed by the allottees of the said houses, and therefore, according to the petitioner, after visiting the site, the contractor was informed on 25.12.1994 not to start the work till further order. The work was to be completed within six months from the date of issuance of the work order, but since the contractor tendered security deposit late and that periiod of time was deducted from six months from the performance of the contract, and accordingly work was to be completed on 26.4.1995. After 25.12.1994 also the work could not be started and the contract could not be performed till 26.4.1995 and came to an end by efflux of time. Therefore, in these circumstances, the contractor filed Arbitration Reference No. 58/1996 before the Gujarat Public Works Contracts Disputes Arbitration Tribunal, at Ahmedabad and claimed Rs. 2,02,085/- by way of compensation. The present petitioner heavily contested the claim on the ground that the contract was not actually repudiated by the respondent - Housing Board, but the respondent Housing Board was sincerely trying to create an atmosphere which may enable the respondent- contractor to perform the contract, and according to the respondent, the reference to the Tribunal was pre-mature. It appears that the Housing Board also took the defence of frustration of the contract as per sec. 56 of the Contracts Act. Therefore, it was vehemently stated before the Tribunal that the members of the Housing Society bluntly refused to cooperate and did not allow the present respondent to carry out the work rendering the performance of the contract impossible. According to petitioner, therefore, the contract was void. The claim of the present respondent also denied by the present petitioner- Housing Board stating that no material as claimed by the present respondent in the Arbitration petition was brought on the

site and on that count or any other count, the present respondent was not entitled to any compensation irrespective of the claims preferred on three heads by the present respondent through Arbitration Application. It was also contended further that line out was given on 13.12.1994, and a joint meeting of contractor, Housing Board and the Members of the Housing Association was held on 16.12.1994, but the persuasion of the allottees of the houses failed and the members i.e. allottees of the Houses remained adamant for not allowing to perform water proofing work by the contractor which was vehemently obstructed by them rendering the performance impossible.

3. After taking into consideration the documents produced on record, affording an opportunity of being heard to both the parties, ld. Arbitration Tribunal came to the conclusion that present petitioner was liable to pay damages to the tune of Rs. 6,600/- towards misc. expenses and idle labour, Rs. 9,873/- towards the cost of materials and carting charges, Rs. 34,693/- towards loss of profit and present petitioner was liable to refund the security deposit of Rs. 8,326/-, totalling to Rs. 59,492/-. In the result, the Arbitration Tribunal passed an award against the present petitioner for an amount of Rs. 59,492/- along with the cost of Rs. 2200/- with running interest at the rate of 12% per annum from 14th September, 1995 till realization. This award of ld. Tribunal dated 17.10.1997 is impugned in this revision application.

4. Ld. advocate Mr. SB Pandit for the petitioner and ld. advocate Mr. KG Sheth for the opponent were heard at length in this revision application.

5. Main limb of the arguments advanced on behalf of the petitioner rests in two folds, and the first part which was vehemently urged is that the contract in question was frustrated as per sec. 56 of the Indian Contracts Act and no party to the contract is entitled to compensation in terms of breach of contract but parties are entitled to restoration only as per the Contract Act. It was vehemently urged that the contract could not be performed, in fact, work could not be started at all because the allottees of 360 houses obstructed the starting of the said work. It was argued on behalf of the housing board that all possible attempts were made to persuade them so the contract can be performed by the contractor. The attention is drawn to the affidavit filed by Mr. BC Patel, concerned Engineer, placed at Ex. 24 of the record, from which, according to the contention of the petitioner, it is clear that a joint meeting was

held and persuation was undertaken. The Deputy Engineer visited the site but the allottees of the colony refused to allow to carry out the work. It is, therefore, contended that the contract could not be performed for the reasons beyond the reach of the petitioner and the contract became impossible to perform as envisaged under sec. 56 of the Act. It was also contended that in this regard, there is no dispute between the parties that the work was obstructed by the allottees of the houses and, therefore, the Tribunal also came to the conclusion that the contract was frustrated and the work was already stopped before 19.12.1994 and that there was no hope of re-conciliation or co-operation from the allottees and both the parties were discharged from further liability. This observation as has been made in para-9 of the award was brought to the notice of this court by the ld. advocate for the petitioner with a contention that firstly, the award of the Tribunal is contradictory inasmuch as in first phase, it is concluded by the Tribunal that the contract was frustrated, while in second phase, in respect of this, the Tribunal awarded compensation to the contractor. It was urged that the said observations of the Tribunal remains final because the same have not been challenged by the otherside. It was, therefore, contended that the contract was frustrated and it became impossible on account of subsequent event that allottees prevented the performance of the work, and the contractor was not entitled to any compensation because the contract was void within the meaning of sec. 56 of the Indian Contracts Act. It was also urged that as per sec. 65 of the Indian Contracts Act, when an agreement is declared as void, any person who has received any advantage under any such contract is bound to restore it. It was, therefore, contended that at the most, the contractor was entitled to refund of security deposit and nothing more than that. The second limb of argument of the petitioner, is based on the fact that for awarding of the compensation, the evidence which the Tribunal took into consideration was clearly deficient and cannot be labelled as evidence at all. It was argued that the bills produced for the claim no. 1 which is miscellaneous expenses, are not corroborated by any entry in the books of account and bills which are produced, fail to prove the expenditure stated to have incurred by the said voucher. As regards claim no. 2, which is for transporting and carting material which was alleged to have been brought on the site, it was said that the voucher produced by petitioner for bringing the material from Bombay to Valsad is not an evidence of carting charges and transport charges. The bills produced on purchasing material from Kalyan Enterprises,

a sister concerned of the contractor, is also not supported by the entries in the account books and that evidence also ought not to have been believed by the Tribunal because none of the documents produced in support of the claim is proved by the petitionercontractor as per the Evidence Act. It was also contended that the Tribunal failed to rely any data for awarding compensation on account of loss of profit i.e. claim No. 3. It was contended that for claim no. 3, neither there was any evidence, nor any logical reasoing to come to the conclusion for the Tribunal to award compensation for loss of profit. Therefore, according to the ld. advocate for the petitioner, in fact, there was no evidence at all on the record to award any compensation to the contractor. It was urged that on these both the counts, award of compensation impugned in this revision application is required to be set aside. For the first part of the argument, ld. advocate for the petitioner relied on two decisions of the Supreme Court i.e. in the matter of Satyabrata Ghose v. Mugneeram Bangur and Co. & Anr. as reported in AIR 1954 p. 44 and in the matter of Smt. Sushila Devi and anr. vs. Hari Singh and others as reported in AIR 1971 SC p. 1756.

6. On the other hand, ld. advocate Mr. KG Sheth for the respondent argued that the contractor did not envisaged or could not have envisaged the obstruction of the work by the allottees. The line out was given on 13.12.1994 and work was to be started, naturally, therefore, the material was brought on the site. When work was sought to be executed thereafter, the same was stopped by the allottees and since the Housing Board failed to persuade the allottees, the Housing Board instructed the contractor not to execute the work till further order. Thus, according to Mr. Sheth, the contractor was not at all in any fault and the damages incurred even due to frustration of the contract legitimately could be demanded by the contractor from the housing board. Ld. advocate Mr. Sheth argued that this is not a case of frustration of contract at the first place because as per the pleadings of the Housing Board, the contract was not repudiated by any of the parties and the stoppage of the work by the allottees was not that impossibility which could be brought within the scope of sec. 56 of the Act as to render the contract void. Ld. advocate Mr. Sheth further argued that the documents which were produced on record were exhibited by the consent of the otherside and, therefore, now, the petitioner cannot be heard to say that the documents

which were produced could not be proved by the contractor. Ld. advocate Mr. Sheth has drawn the attention of this court to sec. 12 of the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, wherein the powers of this court to revise the award of Tribunal are para-materia with sec. 115 of Code of Civil Procedure where the court is empowered with very narrow and limited jurisdiction to interfere with the award of the Tribunal. He further contended that the revision application therefore be dismissed and award may not be interfered with.

7. From the rival contentions and from the record of the case, two main controversies arise for determination. Firstly, whether the contract is void within the meaning of sec. 56 of the Indian Contracts Act and whether the assessment of the Tribunal of the compensation based on the documents produced is revisable in this application.

8. When the first point above is dealt with, it is clear that whether frustration of the contract as to render it void within the meaning of sec. 56 is always a question of fact, therefore, whether frustration of the contract has occured or not always depends on the nature of the contract and on the event which occurred subsequently intervening the performance of the contract. So far as the ld. advocate for the petitioner is concerned, the second part of sec. 56 of the Act is pressed in service. As per second part of sec. 56 of the Act, a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. So far as the facts of the case is concerned, it is not a case of any party that the object of the act had become unlawful, though it is an admitted fact between the parties that the contract could not be performed because allottees prevented the performance of the work by the contractor and now, therefore, the question is, whether this event is said to be an event which promissor could not prevent or this event which can be said to have rendered the performance of the contract impossible as envisaged by second part of sec. 56.

9. As said above, it is always a question of fact whether a contract is frustrated and has become void under sec. 56 of the Indian Contract Act. Section 56 of the Contract Act contemplates that the contract may be void under its provision yet compensation may be payable by the person who is unable to perform it. Whether the impediment or impossibility or unlawfulness or whether

impediment was existing at the time of contract or supervene would be material consideration. The real question that may be considered when it is to be determined whether sec. 56 is applicable or not to the given set of facts is not whether the contract has been void, but whether the promisor has to make compensation for non-performance. The substance of sec. 56 of the Act is the payment of compensation can only be excused when there is no contract to the contrary. At this juncture, therefore, it is necessary to see third part of sec. 56 wherein, it is provided that where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise. Needless it is to say that sec. 56 applies to the executory contract. Third part of sec. 56 cannot be read in detachment of part-II. The second part of sec. 56 read with third part makes it abundantly clear that when promissor knew or with reasonable diligence might have known that performance was likely to be impossible or unlawful and contract is frustrated, such promissor must make compensation to such promisee. Once object of the contract becomes unlawful, the facts stands in oblivion and the contract becomes void, entitling the parties only restoration and not compensation. But, when it is pleaded that the contract has become impossible in fact, then the whole factual scenario would be required to be taken into consideration by a court dealing with such controversy, and satisfy itself that impossibility even considering with its practical implications and consequences was such that it rendered the object of the purpose of the contract impracticable. Only because some onerous duty fall upon the promissor would not absolve him from the consequences of breach. Therefore, to render a contract void under Sec. 56 of the Indian Contract Act, the change, the subsequent events, must be of fundamental or sweeping character which kills the contract itself and not merely of a nature which leaves the contract alive and capable of being performed at a future date. Sec. 56 would not apply to a case to a self inducement, meaning thereby, that the event which is alleged to have frustrated the contract arises from inaction of the party or is of such nature that the party could have taken care of it even before executing of the contract itself.

10. Thus, before doctrine of frustration can be invoked, it must be shown that the event which led to the frustration of the contract was an event which the

parties to the contract could not with reasonable diligence have foreseen it. Unless this fundamental facts are not satisfied, courts ordinarily could not absolve party from performing such a contract.

11. Evaluating the facts of this case, in the light of above said discussion and when positively it is stated that the allottees were in possession of the houses when the contract was executed, it is clear that the Housing Board who entered into the contract with the contractor knew that it had no domain over the houses for which the contract of water proofing is awarded to the contractor. All the more, as envisaged by part-III of sec. 56 of the Act, it could be said without hesitation that the Housing Board could have with reasonable diligence ascertained the wish of allottees of the houses to which water proofing work was to be executed. Without doing this onerous duty, Housing Board entered into the contract with the contractor for the water proofing work of the houses which were not in domain of the Housing Boardpetitioner. Though it was very well within the knowledge of the Housing Board that the houses where the work is to be executed are in possession of the allottees neither petitioner entered in the contract to the contrary that contract shall be void if the work is obstructed by the allottees of the houses nor the petitioner informed contractor that the object of the contract was not within the domain of the petitioner. In view of this fact, I am unable to stretch the impossibility as envisaged by sec. 56 of the Act to engulf, the denial on the part of the allottees of the houses. It is not the case where the object or the purpose of contract or subject matter of the contract was affected by the subsequent event to the extent that it became impossible and impracticable to perform the contract like destroying of the houses by natural calamities or damage to the house to the extent that water proofing would not serve any purpose. Merely because the allottees denied to allow the work to be performed, thus, cannot absolve present petitioner from the promise it made to the contractor nor it can be said that the circumstances were beyond the control of the Housing Board. Ld. advocate for the petitioner relied upon the case of Satyabrata Ghose v. Mugneeram Bangur and Co. & Ors., as reported in AIR 1954 SC p. 44 (supra) to contend that the word "impossible" has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view. Even considering this

ratio as laid down by the Supreme Court in this decision is not of any avail to the petitioner. It could not be said that denial by the allottees to perform the work of water proofing was such an untoward event or such a change of circumstances, totally upsetting the very foundation upon which the parties rested their bargain. On the contrary, having regard to the part-3 of sec. 56, this was the circumstances which Housing Board knew or could have known with due diligence entitling to compensation to the promisee. Further the ld. advocate for the petitioner also relied upon a decision in the matter of Smt. Sushila Devi and anr. vs. Hari Singh and ors., as reported in 1971 SC 1756, wherein the Supreme Court ruled that impossibility contemplated by the provision is not confined to something which is not humanly possible. This ratio of the Supreme Court also would not help the petitioner because in para-11 and 12, the Supreme Court has further observed that if the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view, then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract. On facts of this case, it is clear that even before entering into the contract, the petitioner could have taken diligent care to ascertain wishes of the allottees who had domain over the property for which the work contract was executed.

12. In short, plea of sec. 56 is not available to the petitioner in the above circumstances. In the matter of M/s. Alopi Parshad and Sons Ltd. vs. Union of India, as reported in AIR 1960 SC 588, in para- 20 and 21 of the said decision, the Supreme Court observed that a contract is not frustrated merely because the circumstances in which the contract was made, are altered and that the Contract Act does not enable a party to a contract to ignore the express covenants thereof. The recent decision in the matter of Industrial Finance Corporation of India Ltd., vs. Cannanore Spinning & Weaving Mills Ltd. & Ors., as reported in AIR 2002 SC p. 1841, the Supreme Court observed in para-28 and 29 as under:

"28. We have first thus to consider as to the exact meanings of the words or expressions used in the covenant between the parties. There can be no doubt that a man may by an absolute contract bind himself to perform which subsequently however becomes impossible or to pay

damages for the non-performance and this interpretation is to be placed upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

29. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. It is on this principle that the act of God is in some cases said to excuse the breach of a contract."

Thus, I fail to accept the contention of the petitioner that supervening events of denial on the part of allottees was such an impossibility as envisaged by sec. 56 Part-(2) to render the contract void.

13. So far as second limb of argument of the petitioner is concerned, it is well celebrated principle of law that the Arbitrator need not to follow the technical rules of evidence laid down in the Evidence Act. Even if the Arbitrator admits inadmissible evidence and unless misconduct is proved, the award based on such evidence cannot be interfered with lightly because the Arbitrator is not bound by rules of evidence and strict formality of procedure. Arbitrator is a court selected by the parties and, therefore, Arbitrator may conduct any proceedings in any manner he thinks fit so long he acts in accordance with the principles of natural justice, equity and good conscious. In the present case, this Arbitration Tribunal is statutory one and procedure is prescribed by the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992. Sec. 8, sub-sec. (3) wherein, it is provided that the Tribunal admits the reference under sub-section (2), it shall, after recording evidence if necessary, and after perusal of the material on record and on affording an opportunity to the parties to submit their arguments, make an award or an interim award giving its reasons therefore. In the present case, rojkam of dated 7.10.1997 denotes that the bills and many receipts which were produced by the contractor before the Arbitrator were not objected by the present petitioner, on the contrary, these documents were admitted and exhibited by the consent of the Housing

Board. So far as the present case is concerned, undoubtedly, the facts lead to the inference that contractor must have brought material on the site on line out given by the petitioner to the contractor, therefore, expenses in this respect as proved by the voucher of the Transport company and voucher of the miscellaneous expenses i.e. claim no. 1 and 2 cannot be said to have been decided by the Arbitrator ignoring and forgetting the principles of natural justice. Claim no. 1 is legitimate expenses incurred, claim no. 2 is the expenses for bringing material on site and the charges for the material and the claim no. 3 is a loss of profit. The Tribunal assessed the loss of profit basing estimated cost which was Rs. 4,16,325/-. Naturally, the contractor must have undertaken the work for earning something from this contract. When petitioner is liable to pay compensation to the contractor, it is not at all beyond the scope of consideration, and on the contrary, more germane that contractor is entitled to compensation on account of loss of profit. The Tribunal awarded 10% of the estimated cost as loss of profit to the contractor which comes to Rs. 34,693/-. This finding of the Tribunal therefore, in respect of claim nos. 1,2 and 3 is based on the principle of natural justice and requires no interference in revisional jurisdiction for the reasons and the grounds advanced on behalf of the petitioner.

14. The argument on behalf of the petitioner that the Tribunal come to the conclusion that the contract was frustrated and that parties were discharged from further liability has no substance. My attention was drawn to para-9 of the award wherein while dealing with claim no. 1, the Arbitration Tribunal observed with receipt Exh. 21/8 of Rs. 490/- dated 27.1.1995 that it cannot be considered because the work was already stopped before 19.12.1994. The contract was frustrated and, there was no hope of reconciliation or cooperation from the allottees and both the parties were discharged from further liability. Relying on these observations, it was stated that Award of the Tribunal was contradictory and if the contract is frustrated the contractor was not liable to any compensation. While dealing with this contention, it is necessary to go through the award entirely. It was not the intention of the Arbitration Tribunal to come to the conclusion that the contract was frustrated and parties were discharged from the liability. But these observations are required to be read with the observations made by the Arbitration Tribunal in para-7 of the Award. The Tribunal observed in para-7 as under:

"It is not disputed that though the petitioner tried to start the work on 13.12.1994, the work was actually obstructed by the allottees of the Housing Board, and the respondent had failed to persuade the allottees to co-operate in execution of the work. Thus, it is obvious that the performance of the contract was frustrated and neither the petitioner was thereafter liable to carry out the work nor the respondent had a right to claim performance of the contract from the petitioner. The contract had also come to an end by efflux of time and the respondent cannot now contend that the contract is in force and the reference is premature. The respondent is, therefore, liable to compensate the petitioner for the loss incurred by it due to obstruction of the allottees of the Housing Board."

Now from the above, it is clear that the Tribunal never reached to the conclusion that the contract was void under sec. 56 and parties were discharged. The observation made by the Tribunal in para-9 of the award only connotes that after the efflux of time, if any expenditure is incurred by the contractor, then the said expenditure cannot be compensated to the contractor because the contract had to come to an end by efflux of time. More particularly, work was stopped right from 19.12.1994, and, therefore, the expenditure incurred by the contractor on 27.1.1995 cannot be compensated to him and to that extent, the present petitioner was discharged from the liability. This contention is raised by the petitioner has to be negatived.

15. In the result, I do not find any merits in this revision application and the same is required to be dismissed for the above said reasons.

16. In the above view of the matter, this revision application stands dismissed. Rule is discharged. R & P be transmitted to the Tribunal.

(J.R. VORA, J.)
mandora/